

AIR CARGO - LIMITATION OF LIABILITY - ABOLITION OF OFFICIAL PRICE OF GOLD.
Trans World Airlines v. Franklin Mint. Supreme Court of the United
States, 17 April 1984. Unreported.

This was a petition for certiorari to the Supreme Court from a decision of the Court of Appeals for the Second Circuit: [1984] Australian I.L. News 79.

Under the Warsaw Convention internationally uniform rules were created governing the air carriage of passengers, baggage and cargo. Article 22 set a limit on carrier liability in the following terms:

"(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires..."

These francs, commonly referred to as Poincaré Francs were defined in terms of gold. In the United States the task of converting the liability limit into "any national currency" as required under Article 22 (4) falls within the rule making authority delegated to the Civil Aeronautics Board (CAB). For most of the life of the Convention, the United States maintained an official price of gold. When she accepted membership in the IMF in 1945 she undertook to maintain a par value for the dollar and to buy and sell gold at the official price - \$35 per ounce. For almost forty years this price was used to derive a cargo liability limit of \$7.50 per pound.

When the central banks of most western nations instituted a "two-tier" gold standard in 1968 the gold-based international monetary system began to collapse. Thereafter, official gold transactions were conducted at the official price, and private transactions at the floating, free market price. In August 1971 the United States suspended convertibility of foreign official holdings of dollars into gold. In December 1971 and then again in February 1973 the official exchange rate of the dollar against gold was increased. These changes were approved by Congress in the Par Value Modification Act, 1972, increasing the official price to \$38 per ounce and in its 1973 re-enactment, setting a \$42.22 per ounce price. Each time, the CAB followed suit by directing carriers to increase the dollar-based liability limits in their tariffs accordingly, first to \$8.16 per pound, then to \$9.07 per pound.

In 1975 the member nations of the IMF formulated a plan, known as the Jamaica Accords, to eliminate gold as the basis of the international monetary system. Effective April 1, 1978, the "Special Drawing Right" (SDR) was to become the sole reserve asset that IMF nations would use in their mutual dealings.

In 1976 Congress passed legislation to implement this IMF agreement, the Bretton Woods Agreements Act of 1976 which repealed the Par Value Modification Act. This took effect on 1 April 1978.

As these developments unfolded, the Convention signatories met in Montreal in September 1975. In No. 4 of the "Montreal Protocols," the delegates proposed to substitute 17 SDRs per kilogram for the 250 French gold francs per kilogram in Article 22 of the Convention. Although the United States supported this change and signed Protocol No. 4, the Senate has not yet consented to its ratification.

Although the market price of gold began to diverge from the official price in

1969, the CAB has continued to use the last official price of gold - \$42 22 per ounce as the conversion factor.

In this case, the plaintiff, Franklin Mint Corporation delivered to the defendant, TWA, four packages weighing some 714 pounds. These were for carriage from Philadelphia to Heathrow in the UK. The packages were said to have contained a large quantity of valuable coins, although Franklin made no special declaration of value at the time of delivery. The packages did not arrive and Franklin brought this action to recover their full value which it assessed at \$250,000. TWA claimed limited liability under the Warsaw Convention. The Lower Court accepted this argument, and this was confirmed by the Circuit Court of Appeals but which gave an unusual prospective ruling to the effect that Congress had abandoned the unit of conversion specified by the Convention and had not substituted a new one and since it had not ratified the Montreal Protocol the value of the SDR could not be used. Therefore, the Court proposed that with respect to events creating liability sixty days from the issuing of its mandate, the limits on liability for loss of cargo under the Warsaw Convention would be unenforceable. In relation to earlier events, the last official price of gold was to be used. Both parties filed petitions for a writ of certiorari and amici curiae briefs were filed by the US, the Air Transport Association and the International Civil Aviation Organisation.

The Supreme Court, by a majority of 8 to 1, rejected the proposition that the repeal of the Par Value Modification Act rendered the liability limits unenforceable in the United States. The majority argued that there was a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous Congressional action. Neither the legislative history of the Act and its repeal make any reference to the Convention. The repeal was unrelated to the Convention; it was intended to give formal effect to a new international monetary system. The second reason advanced by the Court was that the Convention was a self-executing treaty. No domestic legislation was required to give it the force of law in the United States and accordingly the repeal of purely domestic legislation should not be interpreted as an implicit repeal or abrogation of any part of the Convention. (This position may be contrasted with the situation prevailing in Australia where the concept of self-executing treaties is not known). As a third reason, the Court also drew attention to Article 39 of the Warsaw Convention which required six months' notice of withdrawal. It stressed that the US administration had taken no steps to notify other signatories that the United States planned to abrogate the Convention and on the contrary maintained in its amicus curiae brief that the administration continued to maintain the liability limits. Fourthly, in response to the plaintiff's argument that a treaty ceases to be binding when there has been a substantial change in conditions, the Court indicated that the doctrine of *rebus sic stantibus* is not available to a private party when the state parties to the treaty continue to assert its vitality.

In relation to the liability limit of \$9.07 per pound specified by the CAB, the Court ruled that this was no inconsistent with domestic law or with the Warsaw Convention. Indeed, tying the Convention's liability limit to the free market gold price failed to effect any purpose of the Framers of the Convention and would be inconsistent with well established international practice. This permits a stable predictable and international uniform limit but encourages the growth of the air carrier industry and remains equitable for carriers and transport users alike.

Stevens J., in a strong dissent, argued that the majority had rewritten the treaty. The standard in Article 22 was not being applied. In his view, the limit set by the CAB was void, for Article 22 nullifies any provision tending to relieve a

carrier of liability or to fix a lower limit of liability than that laid down in the Convention.

The Montreal Protocol remains unratified by the US. Approval by two-thirds of the Senate is required, and the attainment of this is doubtful. Indeed there is a strong lobby, particularly from attorneys who represent passengers, which argue for repudiation on the basis that there is no morale justification for the limitation of liability.

D.F.